

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
La Plata County, Colorado)	MB Docket No. 16-366
)	CSR No. 8927-A
Petitions for Modification of the Satellite)	
Television Markets of KDVR-TV, KCNC-TV,)	MB Docket No. 16-367
KMGH-TV, and KUSA-TV, Denver, Colorado)	CSR No. 8928-A
)	
)	MB Docket No. 16-368
)	CSR No. 8929-A
)	
)	MB Docket No. 16-369
)	CSR No. 8930-A
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2019

Released: June 13, 2019

By the Commission:

1. In this Memorandum Opinion and Order, we grant in part and deny in part the Application for Review (AFR) filed by Hearst Properties Inc., KOB-TV, LLC, and Nexstar Broadcasting, Inc. (Applicants) in the dockets identified above. Applicants seek review of a decision by the Media Bureau (Bureau) to grant four petitions for market modification filed by La Plata County, Colorado (La Plata). The Bureau Order (*Bureau Order*) modified the local markets of Denver television stations KDUR-TV, KCNC-TV, KMGH-TV and KUSA-TV (Denver Stations) to include La Plata. We agree with the Applicants that the Bureau erred in granting La Plata a waiver of a requirement to submit certain evidence and in the manner in which it weighed some of the market modification statutory factors. At the same time, however, we find that the overall weight of the evidence supports grant of the petitions and therefore uphold the Bureau’s decision that La Plata County be added to the local markets in question by both DISH and DIRECTV (DBS carriers). We also direct the DBS carriers and the Denver Stations to provide the Commission with independent status reports explaining their continuing failure to provide the Denver Stations to DBS subscribers in La Plata.

I. BACKGROUND

A. The Satellite Market Modification Process

2. The *Bureau Order* summarizes the satellite market modification history and process in detail so we need not repeat it here.¹ Congress created this process, through its passage of the STELA Reauthorization of 2014 (STELAR), as a means to permit the Commission to add communities to, or

¹ See *La Plata County, Colorado Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado*, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369, Memorandum Opinion and Order, 32 FCC Rcd 1474, 1475-1479, paras. 3-9 (MB 2017) (*Bureau Order*).

delete communities from, a commercial broadcast television station's local television market (or its Designated Market Area (DMA)), for purposes of satellite carriage.² The Commission implemented the statutory satellite market modification process in the *STELAR Market Modification Report and Order*.³

3. In adopting a satellite market modification process, which is modeled on the long-existing cable market modification process, Congress made clear that it intended to address the so-called "orphan county" problem. An orphan county is a county that, as a result of the structure of a local satellite market, is served exclusively, or almost exclusively, by television stations coming from a neighboring state.⁴ Satellite television subscribers residing in an orphan county often are not able to access their home state's news, politics, sports, emergency information, and other television programming. Providing the Commission with a means to address this problem by altering a broadcaster's local market was a primary factor in Congress' decision to create a satellite market modification process. Indeed, the legislative history of the STELAR observes that "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances," may "lack access to local television programming that is relevant to their everyday lives" and instructs us to "consider the plight of these consumers when judging the merits of a [market modification] petition ..., even if granting such modification would pose an economic challenge to various local television broadcast stations."⁵

4. As the Bureau Order explains, the threshold issue that must be considered in a satellite market modification petition is technical and economic feasibility.⁶ The STELAR carves out an exception to satellite carriage obligations⁷ resulting from a market modification that would be technically

² The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (STELAR) (adding 47 U.S.C. § 338(l)). "STELA" refers to the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175. Generally, a television station's "local market" is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (Nielsen). 17 U.S.C. § 122(j)(2); *see also* 47 CFR § 76.66(e) (defining a television broadcast station's local market for purposes of satellite carriage as the DMA in which the station is located). DMAs describe each television market in terms of a group of counties and are defined by Nielsen based on measured viewing patterns. The Nielsen Company delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, Nielsen includes both over-the-air and multichannel video programming distributor (MVPD) viewing.

³ *Amendment to the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71, Report and Order, 30 FCC Rcd 10406 (2015) (*STELAR Market Modification Report and Order*).

⁴ *Id.* at 10408, para. 3.

⁵ *See generally* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 11 (2014) (*Senate Commerce Committee Report*). *See also* Consolidated Appropriations Act of 2019, Pub. L. No. 116-6 (Feb. 15, 2019); Conference Report (H. Rept. 116-9) at 673 (noting that "despite the reforms made in STELAR, many communities continue to struggle with market modification petitions," and directing the Commission to continue to "provide a full analysis to ensure decisions on market modification are comprehensively reviewed and STELAR's intent to promote localism is retained" and "adhere to statutory requirements and congressional intent when taking administrative action under STELAR.").

⁶ *Bureau Order*, 32 FCC Rcd at 1479-1480, para. 11 (citing *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50).

⁷ Pursuant to section 338, satellite carriers are not required to carry local broadcast television stations; however, if a satellite carrier chooses to carry a local station in a particular DMA in reliance on the local statutory copyright license, it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage. 17 U.S.C. § 122. Satellite carriers have a statutory copyright license under the 1999 Satellite Home Viewer Improvement Act (SHVIA) for carriage of stations to any subscriber within a
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or economically infeasible for a satellite carrier to implement.⁸ Once this threshold issue is resolved, section 338(l) of the Communications Act of 1934, as amended (Act), which was added by the STELAR, provides that the Commission must afford particular attention to the value of localism in ruling on requests for market modification. In so doing, we are directed to take into account “such factors as”:

- (1) whether the station, or other stations located in the same area—(a) have been historically carried on the cable system or systems within such community; and (b) have been historically carried on the satellite carrier or carriers serving such community;
- (2) whether the television station provides coverage or other local service to such community;
- (3) whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence;
- (4) whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
- (5) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.⁹

These factors consist of the four long-standing cable market modification factors¹⁰ and a new factor three, which concerns access to in-state programming. The statutory factors are not exclusive, however.¹¹ The Act directs our attention to localism generally, not simply to a mechanistic application of the limited list of factors identified in the statute.¹² A wide range of information can be valuable in assessing whether a

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station’s local market. See Satellite Home Viewer Improvement Act of 1999 (SHVIA), Pub. L. No. 106-113, 113 Stat. 1501 (1999). See also 47 U.S.C. § 338(a)(1); 47 CFR § 76.66(b)(1) (commonly referred to as the “carry one, carry all” requirement).

⁸ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50. Potential satellite market modification petitioners may seek a “feasibility certification” from the satellite carriers prior to the filing of a satellite market modification petition, in order to determine whether such a petition would be feasible. *Id.* at 10435-10436, para. 39.

⁹ 47 U.S.C. § 338(l)(2)(B)(i)-(v).

¹⁰ The new third statutory factor is not limited to orphan county or satellite market modification cases. Pursuant to the *STELAR Market Modification Report and Order*, we consider all five of the statutory factors as part of the review of every market modification petition. We note, however, that we consider factor three inapplicable in cases in which the proposed modification “would not result in increased consumer access to an in-state station’s programming,” and do not count it against a petitioner in such a case. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 19; see also *Victory Television Network, Inc. For Modification of the Satellite Television Market For KVTJ-DT, Jonesboro, Arkansas*, MB Docket No. 17-157, Memorandum Opinion and Order, 32 FCC Rcd 7389, 7399, para. 23 (MB 2017).

¹¹ See, e.g., *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 144-45 (2d Cir. 1998) (observing that the statutory factors “are not exclusive.”).

¹² *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8389, para. 53 (1999) (*Cable Market Modification Second Report and Order*); see also *Implementation of the Cable Television Consumer Protection & Competition Act of 1992, Broadcast Signal Carriage Issues, etc.*, Report and Order, 8 FCC Rcd 2965, 2976-77 (“Section 614(h)(1)(C) of the 1992 Act permits the Commission to add communities to or subtract communities from a station’s television market to better reflect marketplace conditions following a written request.

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particular community should be included in or excluded from a station's local market, and the importance of particular elements will vary depending on the circumstances of each case.¹³ We must therefore consider all relevant information in the record to develop a result that will "better effectuate the purposes" of the Act.¹⁴

5. The Commission's rules require that a market modification petition be accompanied by specific evidence that is relevant to our consideration of localism.¹⁵ Petitions that do not include the required evidence may be dismissed without prejudice.¹⁶ However, the Media Bureau may waive the requirement to submit certain evidence for good cause, particularly if the Bureau is in a position to resolve the petition without such evidence.¹⁷ Parties may submit whatever additional evidence they deem

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The Commission also may determine that particular communities are part of more than one television market. The procedures recognize that [DMAs] may not always accurately reflect the area in which a particular television station should be entitled to cable carriage, and will help ensure that disruption to subscribers over the broadcast signals they receive is minimized. ... This section of the statute is intended to permit the modification of a station's market to reflect its individual situation. Therefore, we do not want to restrict the types of evidence that parties can submit to demonstrate the propriety of changing a station's must-carry market. We also do not believe that it is advisable to prejudice the importance of any of the factors specified in the statute since each case will be unique.") (internal citations omitted).

¹³ *Cable Market Modification Second Report and Order*, 14 FCC Rcd at 8391, para. 59 ("it is inappropriate to state that one factor is universally more important than any other, as each is valuable in assessing whether a particular community should be included or excluded from a station's local market, and the relative importance of particular factors will vary depending on the circumstances in a given case").

¹⁴ 47 U.S.C. § 338(1)(1).

¹⁵ The rules require that the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend or satellite carrier local receive facility locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market;
- (2) Noise-limited service contour maps delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas;
- (3) Available data on shopping and labor patterns in the local market;
- (4) Television station programming information derived from station logs or the local edition of the television guide;
- (5) Cable system or satellite carrier channel line-up cards or other exhibits establishing historic carriage, such as television guide listings;
- (6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both multichannel video programming distributor (MVPD) and non-MVPD households or other specific audience information, such as station advertising and sales data or viewer contribution records; and
- (7) If applicable, a statement that the station is licensed to a community within the same state as the relevant community.

47 CFR § 76.59(b)(1)-(7).

¹⁶ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10424, para. 22.

¹⁷ 47 CFR § 1.3; see also, e.g., *Petition of Tobacco Valley Communications to Exclude Eureka and Communities in* (continued....)

appropriate and relevant, such as detailed information about programming that serves or fails to serve the community in question, and we may consider any relevant information in evaluating a petition.¹⁸

B. La Plata County and the Bureau Order

6. Residents of La Plata County, Colorado, historically have received only New Mexico-based television stations, limiting their access to Colorado-specific news, sports, weather, and politics. This is because La Plata is assigned to the Albuquerque-Santa Fe DMA, which includes 28 New Mexico counties, part of one county in Arizona, and just two Colorado counties (La Plata and Montezuma). La Plata has been repeatedly and specifically identified by the Commission as an “orphan county” with insufficient access to in-state programming,¹⁹ and is the type of community that Congress intended to assist by creating a satellite market modification process.²⁰ Prior to the issuance of the Bureau Order, La Plata residents who subscribed to satellite television service could legally be served only by broadcast stations licensed to communities within the state of New Mexico.²¹

7. La Plata County filed Petitions in 2016 seeking to modify the local satellite television markets of four Denver network broadcast stations so that they would include La Plata County.²² The satellite carriers each filed Feasibility Certifications.²³ Joint oppositions were filed by the Applicants, who are licensees of New Mexico broadcasters serving La Plata, arguing for dismissal or denial of the Petitions.²⁴ Comments in support of the Petitions were filed by local government officials, both of Colorado’s United States Senators, the Congressman representing La Plata County,²⁵ and hundreds of La

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_____ *North Lincoln County from the Local Market of Several Spokane, Washington Broadcasters and Include it in the Local Market of Several Missoula, Montana Broadcasters*, MB Docket No. 15-152, Memorandum Opinion and Order, 31 FCC Rcd 8972, 8976 n.22 (MB 2016).

¹⁸ See *supra* notes 11-14 and accompanying text.

¹⁹ *In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Rcd 11919 at 12480 (MB 2011) (2011 *In-State Report*); *Designated Market Areas: Report to Congress Pursuant to Section 109 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-43, Report, 31 FCC Rcd 5463 at 5670, Appendix D. (2016 *In-State Report*).

²⁰ The “core purpose of this [market modification] provision of the STELAR [is] to promote consumer access to in-state and other relevant programming.” *Id.* 10415, para. 12; see also The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (STELAR) (adding 47 U.S.C. § 338(l)).

²¹ 2016 *In-State Report*, 31 FCC Rcd at 5670. The only full-power commercial broadcast stations serving residents of La Plata County over the air (KRTN-TV and KREZ-TV) are satellites rebroadcasting the signal of New Mexico-based stations.

²² Petition for Special Relief (KDVR) of La Plata County, Colorado, MB Docket 16-366 (filed Sept. 7, 2016) (*KDVR Petition*); Petition for Special Relief (KCNC) of La Plata County, Colorado, MB Docket 16-367 (filed Sept. 7, 2016) (*KCNC Petition*); Petition for Special Relief (KMGH) of La Plata County, Colorado, MB Docket 16-368 (filed Sept. 7, 2016) (*KMGH Petition*); and Petition for Special Relief (KUSA) of La Plata County, Colorado, MB Docket 16-369 (filed Sept. 7, 2016) (*KUSA Petition*) (collectively, the *Petitions*).

²³ *DISH Feasibility Certification* (filed in Docket No. 15-71); *DIRECTV Feasibility Certification* (filed in Docket No. 15-71); see *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10440, para. 47 (directing that pre-filing certifications be filed in Docket No. 15-71).

²⁴ *LIN Opposition to Petitions for Special Relief*, MB Dockets 16-366 and 16-367 (filed November 22, 2016) (*LIN Opposition*); see also *KOAT/KOB Opposition to Petitions for Special Relief*, MB Dockets 16-368 and 16-369 (filed November 22, 2016) (*KOAT/KOB Opposition*). Licensees of the same New Mexico stations filed the instant AFR.

²⁵ Local representatives filing in this proceeding included: Senator Michael F. Bennet, Senator Cory Gardner, Congressman Scott R. Tipton, Director Phil Campbell of the Durango-La Plata Emergency Communications Center, (continued....)

Plata County residents.²⁶

8. In the Bureau Order, the Bureau granted the Petitions for all four stations.²⁷ It found that carriage of the Stations was technically and economically feasible for both satellite carriers.²⁸ The Bureau also found good cause to waive the requirements for Petitioner to submit noise limited service contour maps, data on shopping and labor patterns, cable and satellite system channel guides, and published audience data for the Stations showing their average viewership in the County.²⁹ It formally recognized La Plata's "orphan county" status, acknowledging "the unusual fact patterns present in an orphan county scenario."³⁰ Finally, based on its evaluation of the five statutory factors, the Bureau found a sufficient market nexus between La Plata and the Denver Stations to support the proposed modifications.³¹

C. The AFR, Opposition, and Reply

9. Section 1.115 of the Commission's rules permits "[a]ny person aggrieved by any action taken pursuant to delegated authority" to file an application seeking Commission review of the decision.³² The filing must "concisely and plainly state the questions presented for review," identify the factors which warrant Commission review,³³ and must be filed within 30 days of public notice of the action in question.³⁴ The Applicants timely sought review of the Bureau Order.³⁵ La Plata filed an Opposition,³⁶ and Applicants filed a Reply to the Opposition.³⁷

10. In their AFR, Applicants contend that the Bureau Order conflicts with section 338 of the Act, our rules, and the *STELAR Market Modification Report and Order*. They argue that the Bureau Order improperly creates a regime under which any market modification petition will be granted if it brings in-state stations to an orphan county, regardless of the other facts of the case.³⁸ Applicants claim

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and the La Plata County Board of County Commissioners (who filed the Petitions on behalf of La Plata County).

²⁶ See generally MB Docket Nos. 16-366, 16-367, 16-368, and 16-369, and *Petitions* at Exhibit I (some comments were filed in multiple dockets and/or made in reference to more than one station).

²⁷ See generally *Bureau Order*.

²⁸ *Id.*, 32 FCC Rcd at 1480-1482, paras. 14-18. The Bureau made certain exceptions to its feasibility finding, which are not relevant to the instant proceeding. *Id.* at 1481-1482, paras. 17-18.

²⁹ *Id.* at 1480, para. 13.

³⁰ *Id.* at 1482-1483, para. 19.

³¹ *Id.* at 1489, 1493-1494, 1498-1499, and 1503-1504, paras. 32, 41, 50, and 59.

³² 47 CFR § 1.115(a).

³³ 47 CFR § 1.115(b)(1-2).

³⁴ 47 CFR § 1.115(d). *But see* 47 CFR § 1.115(e) (describing exemptions from the standard timeline that are not relevant to this proceeding).

³⁵ Application for Review, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369 (filed March 31, 2017), <https://ecfsapi.fcc.gov/file/1033123092750/Application%20for%20Review%20of%20Media%20Bureau%20La%20Plata%20County%20Market%20Modification%20Memorandum%20Opinion%20and%20Order.pdf> (AFR).

³⁶ Opposition to Application for Review, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369 (filed May 1, 2017), https://ecfsapi.fcc.gov/file/1050172627646/Opposition%20to%20APR%20final_05.01.17.pdf (Opposition).

³⁷ Reply to Opposition to Application for Review, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369 (filed May 15, 2017), <https://ecfsapi.fcc.gov/file/10515841603221/La%20Plata%20County%20Market%20Mod%20-%20Reply%20to%20Opp%20to%20Application%20for%20Review.pdf> (Reply).

³⁸ AFR at 11.

that the “order fails to give appropriate weight to the evidence relating to all five factors and relies solely on ‘in-state’ programming as dispositive.”³⁹ More specifically, Applicants maintain that, in weighing the statutory factors, the Bureau improperly conflated “in-state” programming with “local” programming and relied on the same programming to weigh in favor of the market modification for both factor two and factor three.⁴⁰ They describe the Bureau Order as therefore establishing a new market modification “framework” that “focuses on ‘in-state’ programming as sufficient, in and of itself” to enhance both the second and third factors, while failing to “consider and weigh the evidence relating to the other factors (one, four, and five) as a counterweight to the evidence of ‘in-state’ programming.”⁴¹ Based on these contentions, Applicants ask us to determine whether the Bureau’s Order:

erred by creating a new standard for evaluating market modification petitions that fails to give appropriate weight to all five statutory factors, conflates localized programming with programming of statewide interest, excuses the failure to meet the Commission’s evidentiary requirements, and produces a result in which any petition seeking modification based on access to in-state television stations will be granted.⁴²

11. In response to these arguments, La Plata counters in its Opposition that the Bureau Order did not create a “new standard,” but instead conducted its analysis as prescribed by the *STELAR Market Modification Report and Order*, implementing our rules as intended by Congress.⁴³ The County argues that the Bureau “gave exactly the right degree of weighting to the in-state signals factor,” and did not do so “to the exclusion of the other four.”⁴⁴ It emphasizes that “Congress directed the FCC to adapt the cable modification rules to help harness the power of satellite TV carriers to meet the needs of orphan counties” like La Plata, without “blindly adopt[ing] those exact same procedures without regard for the underlying policy goals of STELAR.”⁴⁵ La Plata further disputes that the Bureau improperly conflated the “in-state” and “local” programming factors, claiming that the manner in which the factors were weighed is consistent with Congress’ intent,⁴⁶ and that in any event “La Plata County today is deprived equally of *both* kinds of programming.”⁴⁷

12. In addition, Applicants argue in their AFR that the Bureau “improperly excused the County’s failure to meet the evidentiary requirements necessary to demonstrate a market nexus” by waiving in part the requirement to submit certain information pertaining to geographic proximity of the

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 16. The AFR further asserts that the *STELAR Market Modification Report and Order* “pointedly distinguished the difference between locally-targeted programming and state-related programming with respect to statutory factors two and three,” and that the Bureau Order “ignor[ed] this distinction.” *Id.*

⁴¹ *Id.* at 13-14. *See also Reply* at 2 (emphasizing the argument that the Bureau Order allowed the “in-state” factor to “completely subsume” the local service factor and “effectively trump all other statutory factors”).

⁴² *Id.* at 2.

⁴³ *Opposition* at 3.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 4-5.

⁴⁶ *Opposition* at 6.

⁴⁷ *Id.* (emphasis in original). La Plata also provides what it describes as evidence of locally-relevant news stories covered by the Denver Stations, but not the Albuquerque stations. *Id.* at 7 and Appendix A. The *Reply* argues that this evidence is procedurally improper, and goes on to note that even if considered fully, it simply “underscores the dearth of the Denver Stations’” La Plata-specific programming. *Reply* at 4.

Denver Stations to La Plata and their historic viewership in the County.⁴⁸ Applicants argue that the Bureau erred in this regard because “geographic nexus is a hallmark of the underlying goals of market modification,” and the Bureau’s approach misguidedly “sidelines the fundamental principles of localism that market modification is intended to serve.”⁴⁹ Applicants describe the Bureau’s approach as a “wholesale, outcome-determinative change[]” to the evidentiary standard governing orphan county market modification petitions.⁵⁰ They further contend that the waiver of the evidentiary requirements in part constitutes a “per se grant of any market modification petition” involving the addition of an orphan county to an in-state station’s market.⁵¹ La Plata argues in its Opposition that the Bureau’s waiver was proper because “residents of the County have had scant opportunity to develop any viewing patterns for the Station[s],” and that the Petitions “addressed each of the evidentiary showings necessary” for a modification grant in this specific case.⁵²

II. DISCUSSION

13. We grant in part and deny in part the AFR. First, we reject the Bureau’s application of the waiver standard in this case. We emphasize that such waivers are afforded only on a case-by-case basis and, as we explain further below, market modification petitioners must submit all evidence required under our rules or demonstrate their good faith efforts to do so to justify a waiver of that requirement.⁵³ In addition, we agree with the Applicants that the Bureau erred in the manner in which it weighed some of the market modification statutory factors. At the same time, however, we find that the overall weight of the evidence supports grant of the petitions and therefore uphold the Bureau’s decision.

A. Evidentiary Waiver

14. As an initial matter, notwithstanding our conclusion that the Bureau erred in waiving certain of the evidentiary requirements of section 76.59 of our rules, we find that such error does not compel us to overturn the Bureau Order. Specifically, the Bureau waived the requirements for petitioners to submit certain evidence relating to the geographic proximity of the Stations to the Counties and the historic viewership of the Stations.⁵⁴ We rectify this error by weighing the missing evidence against

⁴⁸ AFR at 19.

⁴⁹ *Id.* at 20.

⁵⁰ *Id.*

⁵¹ Reply at 2.

⁵² *Opposition* at 9-10. We note that both Applicants’ and La Plata’s filings fail to sufficiently differentiate between the Bureau’s waiver of the requirement to submit certain evidence and the Bureau’s treatment of evidence that is lacking in the record under the statutory factors. As discussed below, we find the Bureau erred in granting a waiver of the requirement to submit certain evidence based on the record before it, but nonetheless we resolve this matter at the application for review stage for the reasons discussed below. *See infra* note 55 & section II.A. We also reject the Bureau’s decision to treat the missing evidence as neutral rather than negative under the statutory factors. *See infra* sections II.B and C.

⁵³ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421-10423, para. 20.

⁵⁴ *Bureau Order* at 1480, para. 13. As noted above, the Bureau specifically waived the requirements to submit noise limited service contour maps, data on shopping and labor patterns, cable and satellite system channel guides, and published audience data for the stations showing their average viewership in the County. *See supra* para. 8; *see also Bureau Order* at 1480, para. 13. Applicants argue that “by arbitrarily waiving the evidentiary requirements without legal justification because of a lack of geographic nexus, the order sidelines the fundamental principles of localism that market modification is intended to serve.” AFR at 20. As discussed below, while the Bureau erred in granting its waiver, we find that there is a sufficient nexus and that localism was served by the grant of the Petitions.

Petitioners in our assessment of the first and fifth statutory factors.⁵⁵ We accordingly deny the AFR to the extent that it claims that grant of the waiver is grounds to overturn the Bureau Order.

15. We also reject the Bureau's statement that market modification petitions relating to orphan counties "should not be held to the same evidentiary [submission] standards ... as we would apply to a traditional petition for market modification."⁵⁶ As Applicants correctly observe, the Commission decided in the *STELAR Market Modification Report and Order* "to apply the same evidentiary requirements" in satellite market modification petitions as in cable petitions.⁵⁷ It addressed the situation faced by counties like La Plata, acknowledging that they might have difficulty acquiring some of the required evidence.⁵⁸ Rather than eliminating the evidentiary requirements for such counties, however, the Commission urged them to "enlist the aid and cooperation of" the stations they were seeking to bring into their local markets, precisely to "avoid dismissal based on a failure to meet our specific evidentiary requirements."⁵⁹

16. While we reject the AFR's argument that grant of the waiver is grounds to overturn the Bureau Order, we emphasize that the simple fact that an orphan county is involved is not sufficient grounds for waiver of the evidentiary requirements in section 76.59. We expect future petitioners seeking modification of a station's market, including petitioners seeking relief from an orphan county problem, to adhere to the requirements of section 76.59. At a minimum, petitioners must demonstrate a good-faith effort to obtain any missing evidence from the relevant stations before a petition is filed with the Commission. In the future, we direct the Bureau to dismiss without prejudice at the outset of the proceeding petitions that fail to either include all required supporting evidence, or reflect at least an effort to obtain that evidence.⁶⁰ We also encourage petitioners to provide, whenever possible, detailed information about specific programming, sports, events, and news stories relevant to the county that have been broadcast by the station(s) at issue.⁶¹

⁵⁵ See *infra* paras. 19, 25. We recognize that section 76.59(c) directs that petitions that do not include the required evidence "shall be dismissed without prejudice and may be refiled at a later date with the appropriate filing fee." 47 CFR § 76.59(c). The purpose of this pleading rule is to ensure that the parties lay out their positions on all relevant factors at the outset, in order to expedite the resolution of any disputes about how to apply them. See *In the Matter of Definition of Markets for Purposes of the Cable Television Broad. Signal Rules*, Order on Reconsideration and Second Report and order, 14 FCC Rcd 8366, 8387-88 (1999). Here, however, there has already been a considerable expenditure of time and resources by Commission staff and the parties in litigating this matter, which will have been wasted if we were to simply dismiss the petition at the application for review stage. Under our rules, the petitioner could refile the petition with the required evidence or, as explained above, seek a waiver of the evidentiary requirement by demonstrating it has undertaken a good-faith effort to obtain any missing evidence from the relevant stations. In these unique circumstances, we see no benefit to delaying resolution of this matter by dismissing the petition and having the petitioner refile at a later date. Moreover, we find that resolving the matter on review will not prejudice the Applicants because, as noted above, we have weighed the missing evidence against Petitioners by weighing factors one and five against modification of the markets at issue.

⁵⁶ *Bureau Order* at 1480, para. 13.

⁵⁷ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421-23, para. 20.

⁵⁸ *Id.* at para. 14.

⁵⁹ *Id.*

⁶⁰ We note that this directive will apply only to petitions filed after the release date of this order. See *supra* note 55 and accompanying text.

⁶¹ Where accurate, it is also useful for petitioners to note that such programming is not regularly broadcast by any station currently serving the county. See *Bureau Order* at 1480, n. 43.

B. Orphan County Status

17. As the Commission observed in the *STELAR Market Modification Report and Order*, “each petition for market modification will turn on the unique facts of the case,” and there is no single universal way to weigh the statutory factors.⁶² Traditional cable market modification petitions also have been evaluated in this highly fact-specific manner. Indeed, in the earliest days of the cable market modification process, the Commission explained that “it is inappropriate to state that one factor is universally more important than any other, as each is valuable in assessing whether a particular community should be included or excluded from a station’s local market, and the relative importance of particular factors will vary depending on the circumstances in a given case.”⁶³ Nonetheless, geographic factors, including location-driven considerations like proximity, historic carriage, and historic viewership often predominated the analysis of traditional cable market modification petitions.⁶⁴ In STELAR, Congress directed the Commission to address the problem of orphan counties and the need for programming that originates in the same state as the viewer. It did so by broadening the statutory definition of “localism.”⁶⁵ However, under the statutory factors considered in the context of an orphan county fact pattern, geography does not override all other aspects of localism. This would constitute a disregard for both our precedent, which states that no one aspect of a market modification petition is to be considered dispositive,⁶⁶ and for STELAR’s directive.⁶⁷

18. Accordingly, while we affirm the Bureau’s grant of modification, we reject the Bureau’s decision to treat geographic proximity, historic carriage, and historic viewership as merely “enhancement factors” in orphan county cases, only giving them weight to the extent they support the addition of communities to a station’s market.⁶⁸ The Commission in the *STELAR Market Modification Report and Order* decided that every statutory factor would be considered in every market modification case, even those involving orphan counties.⁶⁹ Lack of geographic proximity, historic carriage, and historic viewership are not a basis for denial in orphan county cases when, on balance, other factors support a grant, but the Bureau erred in its decision to treat them as neutral any time they fail to support the expansion of a market. Instead, as reflected in the analysis below, these factors must be given negative weight when they do not support a market modification in assessing whether an orphan county should be included in a station’s local market.⁷⁰

⁶² *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18.

⁶³ *Cable Market Modification Second Report and Order*, 14 FCC Rcd at 8391, para. 59.

⁶⁴ *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 144-45 (2d Cir. 1998) (recognizing the FCC’s market modification analysis in the cable context considers various tests of geographic proximity).

⁶⁵ *See supra* para. 3.

⁶⁶ *See, e.g., In the Matter of Costa de Oro Television, Inc.*, Order on Reconsideration Memorandum Opinion and Order, 15 FCC Rcd 12637, 12642 (CSB 2000) (agreeing with cable operators that “while predicted Grade B contour has been considered by the Bureau in the context of market modification cases, it is not, in itself, dispositive”).

⁶⁷ *See also* Consolidated Appropriations Act of 2019, Pub. L. No. 116-6 (Feb. 15, 2019); Conference Report (H. Rept. 116-9) at 673 (noting that “despite the reforms made in STELAR, many communities continue to struggle with market modification petitions,” and directing the Commission to continue to “provide a full analysis to ensure decisions on market modification are comprehensively reviewed and STELAR’s intent to promote localism is retained” and “adhere to statutory requirements and congressional intent when taking administrative action under STELAR.”).

⁶⁸ *Bureau Order* at 1484-1485, para. 22.

⁶⁹ *See AFR* at 5.

⁷⁰ *See supra* note 63.

C. Statutory Factors

19. Below, we briefly consider the Bureau Order's analysis of each of the statutory factors in this case. The Bureau correctly considered each of these factors separately with respect to each of the four Denver Stations. However, because our discussion touches largely on the treatment and weight of types of evidence, rather than the Station-specific evidence itself, we consider each factor only once and direct readers to the detailed discussion of the record in the Bureau Order.⁷¹

20. As discussed below, we find that the majority of the factors support the requested modification. The first factor relates to historic carriage of the channel in the communities at issue. Historic carriage is an indicator that the station is considered local to the community. Given the lack of evidence of historic carriage, we find that this factor weighs against granting the requested modification. The second factor relates to whether the station provides local service to the communities at issue. Local service can be demonstrated by either evidence that the station places a viewable signal over all, or parts, of the communities, or evidence that that the station provides programming (such as news, sports, weather alerts, and emergency information) targeted to the interests of the communities. Given the overwhelming support for access to the Denver Stations from hundreds of La Plata residents and their official representatives and the evidence they offered that the Denver stations carry programming of specific interest in La Plata, we find that the local service factor supports the requested modification. The third factor relates to whether a station provides access to in-state programming to the residents of the community. The evidence presented strongly supports that the residents of La Plata County do not have access to Colorado stations and that granting the requested modification should provide such access. Thus, the third factor supports the requested modification. The fourth factor relates to whether other stations also provide news or sporting coverage of issues of concern to such community. We find that the in-market stations serving La Plata do not adequately address issues of concern to the community as evidenced by the hundreds of La Plata residents who support the modification asserting that the in-market stations fail to address their issues of concern. Accordingly, the fourth factor also supports the requested modification. The fifth factor relates to viewing patterns of the residents of La Plata. Evidence of strong viewing of a station in a community indicates that the station is considered local. Given the lack of evidence of household viewing by La Plata residents, we find that this factor weighs against the requested modification. We address each factor in more detail below.

1. Historic Carriage

21. The first factor the Bureau was required to consider was "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community."⁷² The Bureau found in this case that Petitioner provided "no evidence with respect to historic carriage" and determined this factor was "neutral" in its analysis.⁷³ In the absence of any evidence of historic carriage of any of the Stations, we hold that Applicants are correct that this factor weighed against modification of the markets at issue.⁷⁴

⁷¹ *Bureau Order* at 1480-1504, paras. 12-59.

⁷² 47 U.S.C. § 338(l)(2)(B)(i).

⁷³ *Bureau Order* at 1485, 1489-1490, 1494, and 1499, paras. 24, 33, 42, and 51.

⁷⁴ The lack of historic satellite carriage in particular, as opposed to cable carriage, is to be expected in any market modification petition, given that satellite providers are generally authorized to carry broadcast stations only in their local markets. 17 U.S.C. § 119(a)(3) (explaining that there are only narrow circumstances under which a satellite provider may receive a statutory copyright license for the importation of out-of-market (or "distant") signals). In this case, however, no evidence was provided of any historic carriage.

2. Local Service

22. Second, the Bureau was required to consider “whether the television station provides coverage or other local service to the community.”⁷⁵ Such “local service” can include, for example, the presence of a high quality over-the-air signal; shopping and labor connections between the local community and the station’s community of license; and programming, including news or sports coverage, specifically about or addressing the community.⁷⁶ The Bureau acknowledged that “overall geographic proximity measures do not enhance the Petitioner’s case,” and that any evidence of local service that might have arisen from geographic proximity did not support grant of the Petition.⁷⁷

23. With respect to programming, the Bureau went on to assert that all programming carried on the station that targets “the State of Colorado” generally is relevant to our consideration under factor two.⁷⁸ We hold that the Bureau improperly treated programming as being “local” simply because it “originat[ed] from and [is] about” Colorado.⁷⁹ Nonetheless, the Bureau correctly gave positive weight under this factor to the hundreds of comments supporting the Petitions, from residents and their official representatives.⁸⁰ As the *STELAR Market Modification Report and Order* made clear, such comments are helpful in demonstrating a nexus between the stations and the local community, because local residents and their official representatives are best positioned to judge what programming will serve the needs of their local community.⁸¹ There is overwhelming and unanimous support for access to the Denver stations from viewers in La Plata. Although we do not credit the late-filed evidence that the County submitted purportedly showing that the Denver Stations carry some programming expressly about La Plata County,⁸² there is compelling evidence, offered by numerous commenters, that the Denver Stations carry programming of specific local interest or import to viewers in the County.⁸³ We therefore affirm the

⁷⁵ 47 U.S.C. § 338(l)(2)(B)(ii).

⁷⁶ Evidence of local service may include “noise-limited service contour maps ... delineating the station’s technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas” (47 CFR § 76.59(b)(2)) and “data on shopping and labor patterns in the local market” (47 CFR § 76.59(b)(3)). A station’s broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *Cable Market Modification Second Report and Order*, 14 FCC Rcd at 8391, para. 59. See also, e.g., *Jones Cable TV Fund 12-A, Ltd.*, Memorandum Opinion and Order, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999) (*Jones*).

⁷⁷ *Bureau Order* at 1485-1487, paras. 25-26.

⁷⁸ *Id.* at 1486-1487, para. 26; see also *id.* at 1490-1491, 1495-1496, and 1500-1501, paras. 35, 44, and 53.

⁷⁹ In part, the Bureau’s error was based on a misinterpretation of a Senate committee report. *Senate Commerce Committee Report* at 15 (“The Committee intends that the FCC’s report will interpret local programming to include not only television programming... originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides.”). See *Bureau Order* at 1486, para. 26 (quoting this passage only in part); see also *AFR* at 18-19 (arguing that the cited language in the *Senate Commerce Committee Report* does not apply to the resolution of market modification petitions, but specifically to a Report to Congress by the Commission that was adopted as section 109 in STELAR).

⁸⁰ *Bureau Order* at 1486-1487, 1490-1491, 1495-1496, and 1500-1501, paras. 26, 35, 44, and 53.

⁸¹ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61 (“[L]ocal government and consumer comments in a market modification proceeding can help demonstrate a station’s nexus to the community at issue.”).

⁸² La Plata notes in its Opposition that the Denver Stations do occasionally cover La Plata news. *Opposition* at 7, Appendix A. Applicants correctly note, however, that La Plata’s evidence regarding La Plata news coverage on the Denver Stations was available and should have been provided during the initial stage of this proceeding. *Reply* at 4. We therefore decline to consider this late-filed evidence.

⁸³ Local representatives who filed in support of the petitions included: Senator Michael F. Bennet, Senator Cory
(continued....)

Bureau's finding that the Denver Stations provide local service to La Plata, and that this factor supports the grant of the modification.

3. Access to In-State Stations

24. The third statutory factor the Bureau was required to consider was “whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.”⁸⁴ The Bureau found that each of the proposed modifications “would promote La Plata County’s access to an in-state television broadcast signal and enhance viewers’ access to in-state local programming that is otherwise of limited availability,” and gave this factor the greatest possible positive weight in the consideration of the Petitions.⁸⁵ Applicants acknowledge that “[i]n-state programming is intended to be weighed in a petitioner’s favor in terms of statutory factor three” and that “state-related programming can be a *component* of localism.”⁸⁶ The Bureau’s reasoning and the weight accorded to this factor are consistent with the Commission’s guidance in the *STELAR Market Modification Report and Order*, and we therefore affirm the Bureau Order with regard to this factor.

4. Other Local Stations

25. Fourth, the Bureau was required to consider “whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.”⁸⁷ The Bureau found that “other stations...provide the County with coverage of local issues and carriage of local sports,” and that consequently “this factor weighs neither against nor in favor of La Plata County’s request.”⁸⁸

26. This factor has not been considered to “operate as a bar to a station’s [] claim [for market modification] when other stations could be shown to serve the communities at issue,” but rather has been considered to “enhance a station’s claim where it could be shown that other stations do not serve the communities at issue.”⁸⁹ Historically then, the Bureau has considered factor four to be an “enhancement factor” – it may serve to support a petitioner’s request to expand a market, but will virtually never weigh against an expansion request.⁹⁰ This approach long predates the adoption of STELAR, and we affirm that

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Gardner, Congressman Scott R. Tipton, Director Phil Campbell of the Durango-La Plata Emergency Communications Center, and the La Plata County Board of County Commissioners (who filed the petitions on behalf of La Plata County). In addition, as noted in the Bureau Order, hundreds of local residents supported the La Plata Petitions. *Bureau Order* at 1474, para. 1; *see also generally* consumer comments in MB Dockets no. 16-366, 16-367, 16-368, and 16-369, and the *Petitions* at Exhibit I. *See, e.g.*, Gail Lovell Comments (“I want to see the news from Denver about issues affecting me.”); Tom Petit Comments (“Last we also do not get the updates we deserve on the sports teams that SW Colorado residents follow”); Carol Cure Comments (“As a resident of La Plata County, Colorado, I am dismayed that we are unable to access Denver-area/Colorado news, political commentary, public affairs information and sports.”).

⁸⁴ 47 U.S.C. § 338(l)(2)(B)(iii).

⁸⁵ *Bureau Order* at 1487, 1491, 1497, and 1501, paras. 27, 36, 45, and 54.

⁸⁶ *AFR* at 13, 18 (emphasis in original).

⁸⁷ 47 U.S.C. § 338(l)(2)(B)(iv).

⁸⁸ *Bureau Order* at 1488-1489, 1492-1493, 1497-1498, and 1502-1503, paras. 30, 39, 48, and 57.

⁸⁹ *See Comcast Cablevision of Danbury, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 274, 279 (MB 2003).

⁹⁰ *See e.g., Great Trails Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 8629, 8633, para. 23 (1995); *Paxson San Jose License, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17520, 17526, para. 13

(continued....)

it remains appropriate to treat this factor as an enhancement factor in most circumstances. We find, however, that the Bureau has relied on an overly narrow reading of this factor by giving it only neutral weight whenever an existing station provides *any* “news coverage of issues of concern” to the community.⁹¹ A better reading is that this factor supports a market expansion whenever significant community needs are being unmet by existing stations. Although this factor may still be accorded neutral, rather than positive, weight in cases where existing stations do not provide news coverage of all issues, sports, and events “of interest to the community,” we clarify that compelling evidence of a significant unmet community need is grounds to give this factor positive weight.⁹²

27. In this case, the Applicants demonstrated that they provide some news coverage of issues of concern to La Plata residents, and some coverage of sporting events.⁹³ They reiterate this undisputed assertion in the AFR.⁹⁴ However, it is clear from the hundreds of comments supporting the modification that a wide range of “issues of concern” to La Plata residents are *not* covered by any broadcast station currently serving the County. In supporting the Petitions, many commenters expressly and strongly state that they are not satisfied with the coverage of issues of concern to them that they are able to receive today.⁹⁵ The same is true with respect to coverage of “sporting and other events.”⁹⁶ These demonstrated

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(1997).

⁹¹ See, e.g., *Bureau Order* at 1488-1489, para. 30.

⁹² See, e.g., *In re Complaint of Fouce Amusement Enterprises, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 668, para 16 (CSB 1995) (in determining whether other stations carry programming of interest to the community, the fact that the cable operator carries other foreign language stations is “irrelevant” to the analysis unless it can be shown that the foreign language programming offered by the station in question is “substantially duplicative” of the other stations’ programming).

⁹³ *Lin Opposition* at 5-7 (listing 23 stories aired over approximately 18 months that are arguably relevant to La Plata County viewers); *KOAT/KOB Opposition* at Exhibit A, Attachments 1-3 and Exhibit B, Attachments 1-2 (listing numerous stories aired over approximately 18 months that are arguably relevant to La Plata County viewers).

⁹⁴ *AFR* at 9.

⁹⁵ As the Commission has observed, “local government and consumer comments in a market modification proceeding can help demonstrate a station’s nexus to the community at issue.” *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n. 61. The Commission there noted that consumer comments could support factor two, as many do in this case (*see supra* notes 81 and 83), but did not limit their relevance to that factor. In the instant case, many of the comments emphasize that the viewing needs of the community are not being met by the existing stations. Such comments are appropriately considered under factor four. *See generally* consumer comments in MB Dockets no. 16-366, 16-367, 16-368, and 16-369, and the *Petitions* at Exhibit I. *See, e.g.*, Paula and Gabriel Bradford Comments (“We do not receive timely news and political campaign programming that is important to our household”); Patricia A. Ellisor, David Ellisor Comments (“We are currently served by New Mexico stations that have not [sic] relevance to our area”); Marcel J. Therberge Comments (“...shows, news, weather, sports, government and political information ... from Albuquerque, New Mexico [] is not related to our needs here in S.W. Colorado”); Mary Karracker Comments (“New Mexico television does not provide weather, safety information, election issues and candidate information, nor educational programs of interest to those in Colorado”); Sheryl Ligtenberg, Julie Winkelman Comments (Having lived in La Plata County, Colorado for over 20 years, we have been forced to watch programming from the Albuquerque stations. Their news is not pertinent to us....[During election years,] we are inundated with campaign information regarding candidates and issues that we are not even voting on and do not receive information that is very relevant to us”); Susan and Dan Ammann Comments (“It would be so nice to watch the news again. We honestly stopped watching the new[s] when we moved here 12 years ago—what happens in Albuquerque and New Mexico is not of interest to us”); Clarence E. Franks Comments (“News from Albuquerque is of little interest and of no relevance to residents of Colorado. Equally important to those of us living in the mountainous areas is information on weather. We get next to no relevant weather information or mentions from New Mexico stations”).

unmet community needs compel us to overturn the Bureau's finding that this factor should be neutral, and instead give this factor positive weight.

5. Viewing Patterns

28. Fifth, the Bureau was required to consider "evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community."⁹⁷ La Plata offered no evidence with respect to household viewing patterns for any of the Denver Stations, and effectively acknowledged that there is no such evidence.⁹⁸ The Bureau gave this factor "no weight" in its consideration of the Petitions,⁹⁹ but in the absence of any evidence of household viewing patterns we hold that Applicants are correct that this factor should have weighed against modification of the markets at issue.

D. Other Arguments

29. *Lack of Cooperation of the Denver Stations.* Applicants argue that the Bureau Order should be reversed in part "on the additional evidentiary ground that the County failed to provide evidence of the Denver Stations' cooperation and willing participation."¹⁰⁰ There is no requirement that the Stations "cooperate," and thus no legal basis for a reversal based on their limited participation in the proceeding.¹⁰¹ As Applicants correctly and repeatedly note, however,¹⁰² the Commission has made clear that if a county is going to file a market modification petition, it would be well served to secure the partnership of the station whose market it seeks to join.¹⁰³ We reiterate that guidance, and emphasize that petitions failing to demonstrate at least a good-faith effort to obtain missing evidence will be considered incomplete and dismissed without prejudice.¹⁰⁴ Because of the business decisions and agreements which must occur to ensure the actual provision of a broadcast station via satellite once a market modification is granted, early and full cooperation with the stations at issue will improve the quality of satellite market modification petitions and significantly smooth the process.

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⁹⁶ See, e.g., Tom Petit Comments ("Last we also do not get the updates we deserve on the sports teams that SW Colorado residents follow such as the NFL World Champion Denver Broncos, NBA Denver Nuggets, MLB Denver Rockies, NHL Denver Avalanche as well [as] Colorado colleges, high schools, etc."); Robert Winslow Comments ("We would also like to be able to receive current news about our Colorado sports teams - not just the professional ones, but high school and college as well. There are many graduates in our area from the University of Colorado and Colorado State University and other state colleges and they would like to hear coverage of their Alma Maters."); Malcolm Perkins Comments ("I am a big Colorado sports fan. I try to keep up with the political happenings in my state, not to mention the weather forecasts, entertainment, and news of Colorado. To know more about what goes on in New Mexico than my own state is ludicrous and completely unacceptable.").

⁹⁷ 47 U.S.C. § 338(l)(2)(B)(v).

⁹⁸ See, e.g., *KDVR Petition* at 6 ("[G]iven the lack of historical [*sic*] carriage of the Station in the County, Nielsen rating or other audience data would not be helpful in evaluating this Petition.").

⁹⁹ *Bureau Order* at 1489, 1493, 1498, and 1503, paras. 31, 40, 49, 58.

¹⁰⁰ *AFR* at 23.

¹⁰¹ A letter from the Denver Stations to their Senators was filed in the record of this proceeding. Letter from Colorado Broadcasters Association Members to Senator Michael Bennet and Senator Cory Gardner (August 29, 2016) (included in *Petitions* at Exhibit H).

¹⁰² *AFR* at 20, *Reply* at 5.

¹⁰³ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10416-10417, para. 14.

¹⁰⁴ See *supra* para. 16.

30. *Destabilization of the DMA System.* Finally, Applicants argue that “granting market modification petitions solely due to access to in-state programming, as the Order does, will jeopardize the stability of existing local television markets in favor of markets based on state boundary lines.”¹⁰⁵ We sustain the Bureau Order on broader grounds than simple access to in-state programming, and in any event, we do not find this argument compelling. First, we note that Congress could have directed us to deny any satellite market modification petitions that, if granted, would jeopardize the stability of existing DMAs. It did not. In fact, Congress took a position exactly to the contrary, instructing the Commission to “consider the plight of these [orphan county] consumers when judging the merits of a [market modification] petition . . . , even if granting such modification would pose an economic challenge to various local television broadcast stations.”¹⁰⁶ In addition, as La Plata astutely observes, “increasing [orphan counties’] access to in-state programming is not merely a pleasant side effect” of the post-STELAR satellite market modification regime, but was rather “a key goal of Congress”¹⁰⁷ and of the Commission.¹⁰⁸ By executing the statutory directive, we are ameliorating a significant problem, *i.e.*, the “orphan county” problem, thereby strengthening the DMA system overall.

E. Conclusion

31. For the reasons discussed above, we affirm the Bureau’s decision to expand the markets of the four Denver Stations to include La Plata County, Colorado, while finding that the Bureau erred both in granting the waiver and in the manner in which it weighed some of the statutory market modification factors. Section 338(l) permits the Commission to add or exclude communities from a station’s local television market to better reflect market realities and to promote access to local programming from broadcasters located in their State.¹⁰⁹ Although the historic carriage factor and the viewing pattern factor weigh against granting a market modification in this instance, we find that the combination of the local service factor, the other local stations factor and, particularly, the access to in-state stations factor outweigh those two factors in this case. We also believe that granting the Petition best serves Congress’ purpose of providing in-state programming to orphan counties. Accordingly, after examining all the relevant evidence and considering the statutory factors in their proper context, we find that a significant nexus exists between the Denver Stations and La Plata County and that the interests of localism are advanced by grant of the requested market modifications.

32. We therefore sustain the Bureau’s decision that La Plata County be added to the local markets of KDVR-TV (Facility ID No. 126); KCNC-TV (Facility ID No. 47903); KMGH-TV (Facility ID No. 40875); and KUSA-TV (Facility ID No. 23074) on both DISH and DIRECTV, on the grounds stated herein.

F. Timing and Status Reports

33. The *Bureau Order* granting the Petition was released on March 1, 2017. Upon grant or partial grant of a satellite market modification petition, broadcast stations that have had their markets expanded have 30 days to elect retransmission consent or mandatory carriage.¹¹⁰ Once the election has been made, the satellite carrier or carriers identified in the Order must commence carriage within 90 days,

¹⁰⁵ *AFR* at 24. The *Opposition* does not address this argument, and the *Reply* only argues in its conclusion that the *AFR* constitutes a defense of the foundations of the DMA system. *Reply* at 5.

¹⁰⁶ *Senate Commerce Committee Report* at 11.

¹⁰⁷ *Opposition* at 5-6.

¹⁰⁸ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10408, para. 3.

¹⁰⁹ *Id.*, 30 FCC Rcd at 10412-13, para. 7.

¹¹⁰ 47 CFR § 76.66(d)(6).

unless the station(s) have elected retransmission consent and the parties have not agreed to carriage in their local market, which consists of their DMA and any communities added through the market modification process.¹¹¹ These deadlines are not tolled or stayed because of an appeal; they may only be delayed by the express decision of the Commission or a court. Although not formally reflected in the record of this proceeding, it appears that the Denver Stations are not currently available to DIRECTV or DISH subscribers in La Plata, even though they are available to subscribers who live elsewhere in the Denver Stations' market.¹¹² As a general matter, when broadcast television stations are retransmitted by DBS carriers they are available throughout the stations' local markets which, in this case, would include La Plata. We therefore direct DIRECTV, DISH, and the four Denver Stations to provide, within thirty days of the release of this Memorandum Opinion and Order, independent status reports explaining the delay in provision of the Stations to every viewer in the Denver Stations' market.¹¹³

III. ORDERING CLAUSES

34. Accordingly, **IT IS ORDERED** that, pursuant to sections 1, 4(i), 338(l), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 338(l), and 405, and sections 1.115 and 76.59 of the Commission's rules, 47 CFR §§ 1.115 and 76.59, the Application for Review filed by Hearst Properties Inc., KOB-TV, LLC, and Nexstar Broadcasting, Inc. on March 31, 2017, is **GRANTED IN PART** and otherwise **DENIED**, as discussed herein.

35. **IT IS FURTHER ORDERED** that the that the Commission's Media Bureau **SHALL SEND** a copy of this Memorandum Opinion and Order to DISH Network LLC, AT&T Communications/DIRECTV, and the licensees of KDVR-TV, Denver, Colorado (Facility ID No. 126); KCNC-TV, Denver, Colorado (Facility ID No. 47903); KMGH-TV, Denver, Colorado (Facility ID No. 40875); and KUSA-TV, Denver, Colorado (Facility ID No. 23074).

¹¹¹ *Id.*

¹¹² See DISH Network, LLC, *Find local channels & programming in your area*, <https://www.dish.com/local-channels/> (last visited May 2, 2019)} and AT&T/DIRECTV, LLC, *Local/Network Channel Availability*, <http://www.directv.com/DTVAPP/global/contentPageIFnorail.jsp?assetId=P4880022> (last visited May 2, 2019). See also, e.g., Letter from La Plata County Board of County Commissioners to FCC Chair and Commissioners (February 26, 2019); Letter from Rep. Scott R. Tipton, 3rd District, Colorado, to Ajit Pai, Chairman, FCC (Mar 5, 2019); Letter from Daniel Rauch, Counsel to the Co. Atty. Gen'l., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 16-366 et al. (Mar. 5, 2019).

¹¹³ We direct the Media Bureau to send copies of this Memorandum Opinion and Order to DIRECTV, DISH, and the four Denver Stations.

36. **IT IS FURTHER ORDERED** that, pursuant to sections 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 403, and section 1.17 of the Commission's rules, 47 CFR § 1.17, DISH Network LLC, AT&T Communications/DIRECTV, and the licensees of KDVR-TV, Denver, Colorado (Facility ID No. 126); KCNC-TV, Denver, Colorado (Facility ID No. 47903); KMGH-TV, Denver, Colorado (Facility ID No. 40875); and KUSA-TV, Denver, Colorado (Facility ID No. 23074) **SHALL SUBMIT** status reports, as described in paragraph 33 above, via email to the Deputy Chief of the Media Bureau at Holly.Saurer@fcc.gov, copying Lyle.Elder@fcc.gov, no later than 30 days after release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary